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In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES A. NOE, HARRY ALLEMAN, RAYMOND F. HUFFT, and JAMES A. NOE, JR., d/b/a JAMES A. NOE & COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALLSMAN, RAYMOND F. HUFFT, and JAMES A. NOE, JR., d/b/a JAMES A. NOE & COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 260 F.2d 739. The decision and order (R. 377-542) of the Federal Communications Commission, and its opinion denying rehearing (R. 543-551), have not been officially reported but are reported unofficially at 12 Pike & Fischer, Radio Regulation 1017 and 1116a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action of the Commission, was entered on October 16, 1958. The petition for a writ of certiorari was filed on January 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Loyola University, by reason of its relationship to the Society of Jesus, is the "representative" of an "alien" or a corporation whose stock is "owned of record or voted" by "representatives" of aliens, within the meaning of Section 310(a) of the Communications Act, and therefore not legally qualified to be a broadcast licensee.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the Petition, pp. 2-3.

STATEMENT

The Federal Communications Commission on July 11, 1956, after a comparative proceeding to determine which of three applicants was best qualified to operate a commercial television station on Channel 4 in New Orleans, Louisiana, granted a construction permit to Loyola University, a Jesuit educational institution in New Orleans (R. 377-542). The Commission concluded that the grant to Loyola would serve the public interest in large part because of the

superiority of its past performance as a radio station licensee in New Orleans (R. 539-541). On June 27, 1957, the Commission affirmed its decision on reconsideration over a contention by petitioner that Loyola was not legally qualified to be a broadcast licensee, under Section 310(a) of the Communications Act, by reason of its connection with the Society of Jesus (R. 543-551).

The Society of Jesus is an order of Roman Catholic priests with a total membership of some 32,000, of whom about 7,500 reside in the United States and about 42 are attached to Loyola University (R. 390, 381). Loyola is a non-profit, non-stock corporation, chartered by the State of Louisiana in 1912, which operates the University and standard broadcast station WWL in New Orleans (R. 381). Under the corporate charter, directors of the corporation—all of whom are American citizens (R. 54-55)—must be priests of the Society of Jesus attached to Loyola University (R. 386-387). The head of the Jesuit religious community at Loyola, the Rector, is *ex officio* President of the University and the corporation and a member of the board of directors (R. 386-387). He is appointed as head of the religious community by the Superior General of the Jesuit Order, presently a Belgian citizen residing in Rome, on the recommendation of the Provincial Superior, an American citizen who is head of the New Orleans Province of the Society (R. 589, 386-387). The Rector has the power to appoint one to three members of the board of directors and to submit a list of names to the Provincial Superior from which list the latter appoints

the other three leaders of the religious community, who *ex officio* become officers of the corporation and members of the board of directors (R. 386-387). Transfers and assignments of priests belonging to the religious community at Loyola, with the exception of the Rector, are controlled by the Provincial Superior (R. 388-389).

In practice, the Loyola corporation operates independently of the Society of Jesus (R. 504-505, 536). Neither the Superior General nor the Provincial Superior has ever attempted to use the power to appoint or transfer to control the University in the operation of its radio station (R. 389). The Loyola corporation does not make reports to the Provincial Superior, does not consult him about actions to be taken, and its board of directors makes all decisions as to corporate activities without any instructions from the Provincial (R. 390). Reports made by Loyola to the Superior General consist of a letter report by the president about twice a year and a financial report by the treasurer once every three years (R. 389). Replies of the Superior General to these reports do not contain suggestions or instructions (*ibid.*). All corporate property belongs exclusively to the corporation, and no other individual or organization has any right, title, or interest in such property (R. 388). The corporation is legally and financially autonomous; it does not support or receive monetary support from the Society of Jesus (R. 596, 608). The Archbishop of the New Orleans Diocese of the Roman Catholic Church has no administrative control over the investments or business activities of the Jesuit Order (R.

389).[1] There is no direct communication between Loyola and other Jesuit communities and institutions in other provinces except at a yearly meeting of the National Catholic Educational Association (R. 391).

At the outset of the comparative proceeding, the Commission found Loyola to be legally qualified to construct and operate a television station (R. 377). Neither petitioner nor any other party sought, in the manner prescribed by the Commission's Rules (47 C.F.R. 1.141), to enlarge the hearing issues to include an issue as to Loyola's legal qualifications (R. 381). However, in connection with its comparative evaluation of the applicants, the Commission found that "Loyola is an independent corporation which, for all practical purposes in this proceeding, is independently owned and operated" (R. 504-505), and further that "the Loyola applicant is independent for legal and practical purposes from the Society of Jesus" (R. 536). On petition for rehearing, the Commission declined to alter its finding that Loyola is legally qualified to be a broadcast licensee, stating that the matters urged by the petitioner had already been considered (R. 548).

The court of appeals unanimously affirmed the actions of the Commission (Pet. App. 1a-9a).[2] Sustain-

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[1] However, expenditures in excess of $50,000 must, by the terms of canon law, be first approved by the "Congress of Religious," an organization of the Roman Catholic Church (R. 390). According to the president of the university, the purpose of this requirement is "so that they don't bring religion into disrepute by getting themselves into debt that they can not liquidate" (R. 613).

[2] Although the Commission found petitioner financially disqualified to receive the television grant, the court below—

ing the Commission's finding that Loyola is for practical purposes independent from the Society of Jesus, the court concluded from the legislative history of Section 310(a) that the ecclesiastical and hierarchical relationship between Loyola and the Society of Jesus did not fall within the Congressional intent of precluding alien ownership of radio facilities to prevent activities against the Government in wartime (Pet. App. 5a, 3a-4a). The court stated (Pet. App. 5a): "Certainly the mere fact that the Rector is appointed by an ecclesiastical superior who is an alien is not enough to bring Loyola within the interdiction of the cited statute." Pointing further (*ibid.*) to the fact that the hierarchical chain of authority "has never been used in the past to impinge upon the independence of the University in the operation of its radio station," the court held (Pet. App. 5a-6a) that even if the Society of Jesus were the type of "alien" contemplated by the statute, the mere possibility of alien control did not make Loyola the "representative" of an alien, within the meaning of Section 310(a), in the absence of any actual control. It concluded (*ibid.*): "Loyola seems to us to fall neither within the letter nor the spirit of the statute."

ARGUMENT

The question presented is narrow, turns on the particular facts, and lacks general importance.

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without expressing an opinion on the Commission's position—assumed for purposes of its decision that petitioner was so qualified (Pet. App. 9a, n. 4).

The holding below is simply that Loyola University is not the representative of an alien within the meaning of Section 310(a) of the Communications Act because of its relation to the Society of Jesus. Far from opening the door to the possibility that the ownership and control of American broadcast facilities will rest in the hands of non-citizens, the court of appeals merely concluded that a unique and primarily ecclesiastical relationship falls within neither the spirit nor the letter of Section 310(a). Taking into account "all the circumstances" (Pet. App. 5a), including the possibility of some alien control implicit in the hierarchical organization of the Society of Jesus and the fact that this chain of ecclesiastical authority "has never been used in the past to impinge upon the independence of the University in the operation of its radio station", the court sustained the Commission's finding that Loyola is for practical purposes independent of the Society of Jesus, and held that there is no alien control of broadcast facilities here (Pet. App. 5a-6a).

Petitioner's contention (Pet. 12-20) that the court below has erroneously restricted Section 310(a)'s prohibition against alien ownership or control ignores the factual determination that Loyola is not the representative of an alien. Asserting that Congress meant to preclude any suggestion of "alien tinge" or possibility of "foreign influence" of any kind, petitioner in effect argues that a finding of independence may not be predicated upon an evaluation of all the circumstances if any one factor would admit of the possibility of alien control. The court of appeals

properly rejected this unduly restrictive view of the legislative intent as "misplaced" (Pet. App. 4a-5a).

As the decision below points out (Pet. App. 5a), while Section 310(a) is directed against alien control of broadcast facilities, it is primarily based "upon the idea of preventing alien activities against the Government during the time of war" (68 Cong. Rec. 3037). See also, S. Rep. No. 781, 73rd Cong., 2d Sess., p. 7; Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., pp. 122-135, 164-173; Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., pp. 23-28, 102-104. Moreover, the section was incorporated in the Communications Act to "guard against alien control and not the mere possibility of alien control" (S. Rep. No. 781, *supra*, p. 7). There is nothing in the legislative history of Section 310(a) which conflicts with the appellate determination, made upon full review of all the facts and circumstances shown on the record rather than by any artificial test,[3] that Loyola's ecclesiastical relation to the Society of Jesus is not such as to make it the representative of an alien within the meaning of Section 310(a). There is no conflict of decisions, and petitioner's disagreement with the weight to be accorded particular circumstances affords no basis for further review by this Court. *Pittsburgh Steamship Company* v. *National Labor Relations Board*, 340 U.S. 498, 502-503.

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[3] See *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 144-146; H. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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